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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

AUDUBON SOCIETY OF PORTLAND, WILDLIFE CENTER OF THE NORTH COAST, ANIMAL LEGAL DEFENSE FUND, CENTER FOR BIOLOGICAL DIVERSITY, FRIENDS OF ANIMALS, Plaintiffs, v. U.S. ARMY CORPS OF ENGINEERS, U.S. FISH AND WILDLIFE SERVICE, USDA WILDLIFE SERVICES, Defendants.	Civil No. 15-665-SI TREATY TRIBES MEMORANDUM IN OPPOSITION TO PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION

I. Introduction

In 1991, roughly 2,026 nesting pairs of double-crested cormorants occupied East Sand Island, located in the Columbia River estuary and used by the U.S. Army Corps of Engineers for decades for the disposal of sand dredged from the Columbia River. By 2013, the population of double-crested cormorants on the island had grown to 14, 916 nesting pairs, a seven-fold increase in just over two decades. Thousands of additional double-crested cormorants, some of which are offspring of the East Sand Island colony, also occupy the Columbia River estuary, particularly on the Astoria-Megler Bridge.

In 2013 by conservative estimates, double-crested cormorants at East Sand Island consumed more than 16.3 million juvenile salmon. Over the last decade, double-crested cormorants have consumed more than 126.7million juvenile salmon from the Columbia River. Declaration of Blaine Parker at ¶ 11 (hereinafter "Parker Decl.")

In 1997, the professional staff of the Columbia River Inter-Tribal Fish Commission (CRITFC) first engaged in research to assess the diet and breeding habits of cormorants in the Columbia River estuary.[1] At the direction of and on behalf of its member tribes, CRITFC also engaged in management forums (e.g., Caspian Tern Working Group, Inland Avian Predation Workgroup, Estuary Avian Group, etc. established by the federal government to address double-crested cormorant and Caspian tern predation in the Columbia estuary). In 1998, CRITFC made recommendations in the final Avian Predation Management Plan. CRITFC's recommendations included:

[1] In 1977, the four treaty tribes of the Columbia River – the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Nez Perce Tribe, and the Yakama Nation – created the Columbia River Inter-Tribal Fish Commission. CRITFC has been charged by its member tribes to provide coordination services, technical expertise and legal support in regional, national, and international efforts to ensure that treaty fishing rights and fishery resources are conserved and protected.

- Prevent cormorants from nesting on channel markers, pilings and on Rice Island;
- Use bird deterrent techniques to disperse or exclude fish-eating birds from areas where they concentrate to feed on salmonids;
- Continue to investigate factors that influence bird predation rates on hatchery and barged released fish and use that information to help improve juvenile salmonid survival; and
- Monitor the effectiveness of all management actions implemented to reduce bird predation.

Since 1997, CRITFC has regularly expressed the tribes' concern that avian predation on out migrating juvenile salmon, including predation by double-crested cormorants from the colony on East Sand Island, is rapidly expanding. Recovered pit tag data continues to show that avian predators consume significant portions of the Basin's juvenile salmon. Between 2000 and 2015, CRITFC wrote numerous formal and technical letters to the federal government asking that it take actions, within the scope of the government's legal authorities, to control avian predation, specifically predation by double-crested cormorants and Caspian terns in the Columbia River estuary.

After millions of dollars of research and more than two decades of analyses and findings, public debate, environmental studies, and a full Environmental Impact Statement, the federal government is finally poised to begin efforts to control double-crested cormorant predation on juvenile salmonids in the Columbia estuary. The Plaintiffs in this proceeding have a long history of resisting avian predator controls, including population and habitat restrictions for Caspian terns and control of double-crested cormorants at East Sand Island, that would benefit Columbia River salmon populations. Meanwhile, the tribes have contributed their technical assistance and waited, albeit impatiently, for the federal government to act.

II. ARGUMENT

The Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakama Nation, and the Confederated Tribes of the Umatilla Indian Reservation (hereinafter "Treaty Tribes") oppose the Plaintiff's Motion for Preliminary Injunction, Dkt. No. 19. The Treaty Tribes believe that the equities in this case strongly support the position of the United States to allow the Corps of Engineers to proceed in 2015 with actions to control double-crested cormorants as permitted by the U.S. Fish and Wildlife Service (collectively "government" or "federal government"). As discussed below the balance of harms does not tip sharply in favor of the Plaintiffs. The Plaintiffs overlook the interests of the Treaty Tribes and the harms the Tribes have suffered from double-crested cormorants preying on salmon and steelhead to which the Tribes have treaty reserved rights to manage and harvest.

A. Standard for Issuing a Preliminary Injunction

A plaintiff requesting a preliminary injunction "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council Inc.*, 555 U.S. 7, 20 (2008); *see also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) ("*Cottrell*"). The Ninth Circuit takes a "sliding scale" approach to the preliminary injunction standard, requiring that all four elements of the *Winter* test are met. Regarding the second element of the *Winter* test, the Supreme Court rejected the Ninth Circuit's previous approach that possibility of irreparable harm was sufficient and instead a plaintiff must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22; *see also Cottrell*, 623 F.3d at 1131. With regard to the third element in the *Winter* test, even where serious questions are raised, in other words where a "substantial case for relief on the merits" is made, *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011), it is necessary that "the balance of hardships *tips sharply* in the plaintiff's favor." *Cotrell* at 1134-35 (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (internal quotations and modification omitted) (emphasis added). The assignment of weight to particular harms is a matter for district courts to decide. *Earth Island Institute v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010) quoting *Winter*, 555 U.S. at 9. When the government is a party to the case, the third and fourth elements of the *Winters* test merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2013).

B. The Balance of Harms Favors Control Actions in 2015

The Treaty Tribes support the government's proposal to take 3,489 cormorants and oil 5,879 cormorant nests in 2015. The government's proposal will not irreparably damage the cormorant populations on East Sand Island, will reduce the need for more extensive population control measures in the future and will phase in over time. This approach will also increase scientific understanding of double-crested cormorants and their predator-prey relationships with juvenile salmon, steelhead and other species, reduce the consumption of juvenile salmon and steelhead in 2015 and beyond, fulfill commitments that the government has made to the tribes and others to undertake conservation measures, and increase the number of adult salmon and steelhead in the future.

1. Control actions in 2015 will not irreparably damage the double-crested cormorant population on East Sand Island, even if plaintiffs were to prevail on the merits.

Left unchecked in 2015, the East Sand Island colony is likely to produce more than 20,000 fledglings. The USFWS and Corps of Engineers' decisions to take 3,489 double-crested cormorants and oil 5,879 double-crested cormorant nests in 2015 is a conservative management action. Oiling eggs will not immediately reduce the breeding colony size in 2015, but it will reduce the number of fledglings to be produced by the colony this year.

These actions are intended to reduce the size of the colony, but the effects of these actions are not irreversible. The colony at East Sand Island has a demonstrated ability to grow and can be expected to continue to do so in the future. Parker Decl. ¶¶ 37-45. The double-crested cormorant colony at East Sand Island will continue to be closely monitored in 2015 and beyond, as it has been since 1997. Final Environmental Impact Statement on Double-Crested Cormorant Management Plan to Reduce Predation of Juvenile Salmonids in the Columbia River Estuary (hereinafter “FEIS”) at 1-10. Should the plaintiffs prevail on the merits and double-crested cormorant control measures be halted, the extraordinarily productive breeding colony East Sand Island will continue to add salmon-consuming double-crested cormorants to the Columbia River estuary. *Id.*

2. Proceeding with control actions in 2015 will reduce the need for even more extensive management actions, in the likely event that the government prevails on the merits.

Were it possible to initiate control measures when the colony was much smaller, the scope and intensity of the needed management actions would be less. When the tribes first requested management actions in 1998, 6,300 breeding pairs were in the double-crested cormorant colony at East Sand Island. FEIS at Appendix C, Table C.1-2. Actions were not taken, and now the colony has more than doubled in size.

NOAA Fisheries set forth Reasonable and Prudent Alternative number 46 (RPA 46) in its 2014 FCRPS Supplemental Biological Opinion, to address the predation by double-crested cormorants colony located at the man-made East Sand Island, requiring that

> The FCRPS Action Agencies will develop a cormorant management plan (including necessary monitoring and research) and implement warranted actions to reduce cormorant predation in the estuary to Base Period levels (no more than 5,380 to 5,939

nesting pairs on East Sand Island).

Implementation Plans (and planned completion dates)

- Environmental Impact Statement (EIS)/Management Plan will be completed by late 2014
- Record of Decision will be issued late 2014
- Actions will begin to be implemented in 2015 Annual Progress Report
- Progress will be documented in the Action Agencies' annual implementation reports

2014 FCRPS Supplemental Biological Opinion at page 410. The government is on track to implement this action to reduce the colony size to the levels now specified in RPA 46. The magnitude of control actions required, even while phased over a number of years, is much greater than it would have been in prior years when the colony was much smaller. Waiting to institute control measures will only exacerbate the situation as the East Sand Island colony continues to grow and produce offspring that occupy the estuary. FEIS at Appendix E-3, pg. 3 (discussing the no action alternative)[2].

3. Plaintiffs compensatory mortality argument is misguided.

Essentially, plaintiffs argue that the cormorants eat only those fish that would have died anyway due to their impaired physical condition, from injury or illness, and that the government failed to consider this. Plaintiffs are wrong on both counts. Compensatory mortality was considered by the government, who did so by assessing the change in juvenile fish predation under several alternative control scenarios. Each of these alternative control scenarios was compared to a 1983-2002 base case. The base case incorporates whatever compensatory mortality existed in those years. Like the base case, the alternative control scenarios also reflect an unspecified level of compensatory mortality. Parker Decl. ¶¶ 14-27.

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[2] The tribes believe the FEIS estimate of cormorant growth is conservative. Parker Decl. ¶¶ 44-46. In addition to nesting at East Sand Island, double-crested cormorants have been increasing in numbers and at a variety of locations within the Columbia River estuary over the last three decades, including Trestle Bay, a pile dike near the town of Chinook, WA, pilings at Desdemona Sands and the Astoria-Megler Bridge. The breeding pairs at the Astoria-Megler Bridge grew substantially from 2003 to 2012. Parker Decl. ¶ 46.

Separately determining the level of compensatory mortality, either in the base case or future control scenarios is, after seventeen years of study, not currently possible. Parker Decl.¶ 15. Neither the Plaintiffs nor the government have the data and analyses to separately quantify compensatory mortality. The Plaintiffs' compensatory mortality argument would place a burden of proof on the government that is not required by law.

When courts address disputes that involve "'primarily issues of fact,'" courts must resolve the disputes "in favor of the expert agency so long as the agency's decision is based on a reasoned evaluation of the relevant factors." *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 954 (9th Cir. 2003) (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377-78 (1989)). Thus, courts "defer to an agency's determination in an area involving a 'high level of technical expertise.'" *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (citing *Selkirk Conservation Alliance*, 336 F.3d at 954 (citation omitted)); *see also San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d at 994 (9th Cir. 2014) (Agency deference "is at its highest where a court is reviewing an agency action that required a high level of technical expertise."). The analytical methods chosen by the government reasonably determined that compensatory mortality would have been present in both the base case and the control scenarios and accounted for that mortality as best it could in the likely outcomes. Parker Decl. ¶¶ 20-22.

As thoroughly discussed in the Parker Declaration, the assumptions in Plaintiffs' Memorandum, p. 12 to 13 regarding compensatory mortality does not withstand close scrutiny. The evidence for compensatory mortality, as cited and argued by the Plaintiffs, is largely based on a study that was conducted in the Snake River Basin, not the Columbia River estuary. Differences between the Snake River and the Columbia River estuary limit the conclusions that may be drawn from the study with regard to double-crested cormorant predation in the estuary.

Parker Decl. ¶ 17. The degree of fish injury present in the Snake River population was much higher than the injury measured at the Bonneville Dam sampling site. Parker Decl. ¶¶ 23-25. The colony size in the Snake River (approx. 300) is vastly smaller than the colony size at East Sand Island (approx. 14,000). Parker Decl. ¶ 17. And the prey populations are different in each location. Parker Decl. ¶ 17.

The only way double-crested cormorants predation would have no impact on adult returns is if the double-crested cormorants predation is 100% compensatory, that is if double-crested cormorants consumed only juvenile salmonids that were destined to die before reaching maturity. “There is no evidence of such an extraordinarily selective consumption pattern.” Parker Decl. ¶ 22. Rather, available evidence indicates that the numbers of injured fish entering the estuary has been reduced in recent years compared to the base case. Parker Decl. ¶ 23. The most common measure of fish injury is descaling. The number of descaled fish sampled at Bonneville Dam has declined to about three percent of the juvenile Spring Chinook and Steelhead passing the Dam. Parker Decl. Figure 5. Moreover, susceptibility to predation does not equate to a direct measurement of compensatory mortality. Parker Decl. ¶ 19. The Plaintiffs’ arguments discounting the benefits of reducing double-crested cormorant predation do not overcome the available scientific information.

4. The federal plan will begin a new phase of scientific study with regard to the cormorant populations on East Sand Island.

The cornerstone for many management plans in the Columbia Basin region is adaptive management. In order to have robust and effective adaptive management, information needs to be collected across a range of management actions. This range of information then informs managers and allows them to make fact-based decisions and modify actions as needed. The more accurate and comprehensive the information, the greater the likelihood that these management actions will meet the objectives and goals that have been identified.

Chapter 5 of the FEIS reviews the Monitoring and Adaptive Management Plan that is proposed by the action agencies for double-crested cormorant management. The preferred alternative in the FEIS is a completely new strategy for East Sand Island, which affords the managers the opportunity to evaluate and collect valuable information at this site. The double-crested cormorant colony on East Sand Island is unique among double-crested cormorant colonies anywhere in the Western United states, partly due to its enormous size, so actions elsewhere may not apply to the East Sand Island colony. The FEIS Management Plan outlines a strategy for monitoring that is more than adequate and will keep the action agencies and regional managers informed in a timely manner so actions can be modified to insure the purpose of the action will likely be achieved and the safe guards that have been put in place will monitored. The FEIS preferred alternative wisely phases in the management actions across several years instead of all in one year. This affords the opportunity to learn and alter management actions to better insure all the requirements in the FEIS are met.

5. The federal plan will reduce the consumption of salmon and steelhead by more than 1.8 million juveniles in 2015.

The control actions in 2015, if allowed to proceed, should reduce the total numbers of juvenile salmon and steelhead consumed by about 1.8 million juvenile fish this year alone. Parker Decl. ¶ 11. Reductions in juvenile salmon mortality will increase in future years as the control measures are phased in. Moreover, as a reduction in juvenile salmon and steelhead mortality *rates*, the benefits of this action should compound over time.

Without management actions, the population of double-crested cormorants at East Sand Island will continue to grow. In the period from 1997 to 2019, the East Sand Island colony produced approximately 354,000 fledglings, which, in addition to their parents, will also feed on juvenile migrating salmon. Parker Decl. ¶ 38. In the future, many of these fledglings will return to East Sand Island to become part of the breeding population or disperse to other areas in the estuary, such as the Astoria-Megler Bridge. *Id. at* ¶¶ *39-47*.

Plaintiffs argue that some of the fish consumed by cormorants are hatchery fish, not all of the fish consumed are listed under the Endangered Species Act, and some of the non-salmonid fish eaten by cormorants might prey upon juvenile salmon and steelhead. The Plaintiffs' arguments are misdirected.

With regard to hatchery fish, Plaintiffs argue that hatchery fish consumption by cormorants is irrelevant. Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction (hereinafter "Plaintiffs' Memorandum in Support") at p. 13. Plaintiffs overlook the fact that many hatchery fish in the Columbia Basin are listed under the Endangered Species Act. In fact, NMFS has included hatchery fish in *all* of the listed salmon and steelhead populations above Bonneville Dam. *See* Final Rule to Revise the Code of Federal Regulations for Species Under the Jurisdiction of the National Marine Fisheries Service (79 Fed. Reg. 20802 (April 14, 2014)(to be codified at 50 C.F.R. pts. 223-224). Plaintiffs argue that hatchery fish are of no benefit to the listed population, stating that hatchery fish "of course do not contribute to productivity of listed salmon and steelhead spawners." Plaintiffs' Memorandum in Support at p. 13. This position was soundly rejected in *Trout Unlimited v. Lohn*, 559 F.3d 946, 957-959 (9th Cir. 2009).[3] Moreover, hatchery fish are subject to the tribes' treaty fishing rights. *United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985)(*en banc*) (holding that hatchery-reared fish are

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[3] Quoting favorably from NOAA's hatchery listing policy, while upholding the policy and its application, the Ninth Circuit considered the influences hatcheries may have in listing determinations. "The presence of hatchery fish within the ESU can positively affect the overall status of the ESU, and thereby affect a listing determination, by contributing to increasing abundance and productivity of the natural populations in the ESU, by improving spatial distribution, by serving as a source population for repopulating unoccupied habitat, and by conserving genetic resources of depressed natural populations in the ESU." *Trout Unlimited* at 958.

"fish" within meaning of treaty fishing clause and subject to allocation thereunder). Loss of hatchery fish to double-crested cormorants may not be important to the plaintiffs, but it is important to the Treaty Tribes.

For example, spring Chinook in the Deschutes River Basin are not listed under the Endangered Species Act. In 2015, the Warm Springs Tribe instituted a partial spring chinook fishery closure for the Deschutes River Basin during its ceremonial and subsistence spring fishery. The State of Oregon closed the Deschutes River Basin to spring Chinook sports fishing. These restrictions were unusual and locally controversial. Affidavit of Bruce Jim (hereinafter "Jim Aff.") ¶ 11. They were carried out to conserve this non-listed group of salmon. The Treaty Tribes disagree with the Plaintiffs that non-listed salmon are unimportant.

One of the sources of morality contributing to the conservation issues facing Deschutes spring Chinook salmon is avian predation. In a series of reports, the U.S. Fish and Wildlife Service documents that avian predators at East Sand Island have consumed juvenile spring Chinook salmon emigrating from the Deschutes River basin. Parker Decl. ¶ 31, Figure 2. This is evidenced by recovery of electronic tags (PIT tags) at East Sand Island that were inserted in juvenile spring chinook salmon before they emigrated from the Deschutes Basin. Moving forward with cormorant control measures at East Sand Island should reduce the number of Deschutes Basin Spring Chinook consumed in the estuary.

The Plaintiffs assert that double-crested cormorants also consume juvenile shad and northern pikeminnow that would otherwise compete with juvenile salmon or consume them. Plaintffs' Memorandum in Support at p. 13. As explained in the Parker Declaration, adult shad are not a food source for cormorants during the cormorant breeding season. Parker Decl. ¶ 36. Cormorants that overwinter in the interior Columbia Basin do eat juvenile shad. Pikeminnow are eaten in very low amounts by cormorants when compared to the other species in their diet. The number of pikeminnow consumed by cormorants does not appear to be a factor in the regulation of the pikeminnow population. Parker Decl. ¶¶ 32-34.

6. The federal plan will fulfill commitments that the government made in the FCRPS Biological Opinions.

The Treaty Tribes have voluntarily restricted their treaty secured fisheries to help rebuild salmon and steelhead throughout the Basin, including helping to rebuild salmon populations listed under the Endangered Species Act. The tribes' voluntary commitments are part of a much larger package of actions that includes:

a. The conservation and salmon rebuilding commitments made by all of the parties to *U.S. v. Oregon* in the 2008-2017 Management Agreement adopted by order of the U.S. District Court of Oregon. Order Adopting 2008-2017 *United States v. Oregon* Management Agreement. *United States v. Oregon*, No. 68-513-KI (D. Or. Aug. 12, 2008), ECF 2546.

b. The commitments in the FCRPS Biological Assessments and Opinions, including RPA 46 intended to reduce double-crested cormorant predation at East Sand Island to the level that occurred in 1983 to 2002 baseline.

c. The commitments to regional investments and rebuilding actions described in the Three Tribes Fish Accords agreement with the U.S. Army Corps of Engineers, U.S. Bureau of Reclamation and Bonneville Power Administration. *Columbia Basin Fish Accords Memorandum of Agreement between the Three Treaty Tribes and FCRPS Action Agencies*, May 2, 2008

d. The coast wide reductions in Chinook harvest adopted by the United States and Canada pursuant to the Pacific Salmon Treaty. Treaty Concerning Pacific

Salmon, with Annexes and Memorandum of Understanding, U.S.-Can., Jan. 28, 1985, T.I.A.S. No. 11,091,1469 U.N.T.S. 358.

Implementation of RPA 46 is an important element among the many in these agreements. Were it not included in the FCRPS BiOp, the Treaty Tribes would have insisted that similar actions be included in the Accords Agreement. The Treaty Tribes have advocated for cormorant control measures for more than a decade and a half.

III. CONCLUSION

The Treaty Tribes respectfully urge this court to deny the Plaintiffs' Motion for Preliminary Injunction. The balance of harms does not tip sharply in favor of the Plaintiffs. Rather, the balance of the equities lies in favor of the proceeding with the government's proposed actions that the Treaty Tribes have long awaited.

Dated this 6th day of May, 2015.

Respectfully submitted,

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